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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

GEORGE JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered November 9, 1956.

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (R. Group 11)* was entered June 1, 1956 and has not been reported. The opinion of the Court of Appeals (R. 5-22)* has not been reported but is set forth in full as Appendix A, *infra*, pp. 11-27.

*Record references are to the original papers as certified and transmitted by the Clerk of the Court of Appeals to the Supreme Court. The District Court papers are designated by group numbers (e.g. R. Group 11); the Court of Appeals papers are designated by page numbers (e.g. R. 5-22).

Jurisdiction

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered November 9, 1956 (R. 23). The time for filing a petition was extended on December 8, 1956 to and including January 9, 1957, by order of Mr. Justice Harlan.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the refusal to provide an indigent defendant in a criminal case in the federal courts with a transcript of the trial proceedings, or its equivalent, in order that he may show that the trial court was in error in certifying, pursuant to 28 U. S. C. 1915(a), that an appeal *in forma pauperis* was not taken in good faith, denies to such person due process of law as guaranteed by the Fifth Amendment.

2. Whether the refusal to assign counsel, at the request of an indigent defendant in a criminal case in the federal courts, denies to such person rights guaranteed to him by the Sixth Amendment.

3. Whether an indigent defendant in a criminal case in the federal courts, by reason of his inability to pay the costs of an appeal, may be denied the right to full appellate review of the proceedings in which he has been convicted.

Statutes Involved

Pertinent provisions of the Constitution of the United States, Federal statutes and Federal Rules of Criminal Procedure are set forth in Appendix B, *infra*, pp. 28-31.

Statement

On March 22, 1956 a seven-count indictment was returned against petitioner and four other persons in the United States District Court for the Eastern District of New York. The indictment charged petitioner with violations of 18 U. S. C. 495, 1708, 2 and 371 in that, *inter alia*, he stole, forged and uttered two United States Treasury checks each in the amount of $66.40 (R. Group 2). On April 9, 1956 he entered a plea of not guilty (R. Group 2).

Petitioner went on trial before Judge Rayfiel and a jury on May 3, 1956 (R. Group 2). Throughout the trial petitioner was represented by court-appointed counsel (R. Group 2). On May 7, 1956 the jury returned a verdict of guilty against petitioner on all seven counts of the indictment (R. Group 2). On May 24, 1956 petitioner was sentenced by Judge Rayfiel to serve a term of three years on each of the seven counts, the sentences to run concurrently (R. Group 7).

On May 25, 1956 petitioner, *pro se*, filed a notice of appeal to the United States Court of Appeals for the Second Circuit (R. Group 11). On the same date petitioner addressed a petition, supported by an affidavit of poverty, to the trial court for leave to appeal *in forma pauperis*. Petitioner stated in this petition (R. Group 11):

> "Many prejudicial errors, were committed against me, and I therefore need the records and minutes to present them to the United States Circuit Court of Appeal for the Second Circuit."

In a written memorandum dated June 1, 1956, Judge Rayfiel denied the petition for leave to appeal *in forma pauperis*, stating (R. Group 11):

> "The issues in the case were simple. The jury was adequately and properly instructed as to the law. The evidence amply supported its verdict.

> "I am satisfied, and accordingly certify that the appeal is frivolous, lacking in merit, and not taken in good faith."

On September 20, 1956 petitioner addressed a motion to the Court of Appeals for: (1) leave to appeal *in forma pauperis;* (ii) assignment of counsel; and (iii) an order requiring the United States to prepay the cost of the minutes and records of all proceedings. This petition also was supported by the requisite poverty affidavit and a sworn statement that it was made in good faith and in the belief that petitioner was entitled to the relief sought (R. 1-2).

On November 9, 1956 the Court of Appeals, by a divided vote, "wholly denied" petitioner's motion. The majority held that Judge Rayfiel's determination that petitioner's application for leave to appeal *in forma pauperis* was not taken in good faith is "final" since there was no showing that he [Judge Rayfiel] acted without warrant or not in good faith. The Court of Appeals, which did not have before it a transcript of the trial proceedings or its equivalent, refused to look behind the trial judge's ruling. The dissenting opinion of Judge Frank brings sharply into focus the denial, inherent in the majority's interpretation of 28 U. S. C. 1915(a), of rights guaranteed by the Fifth and Sixth Amendments.

Reasons for Granting the Writ

This case presents important questions concerning the administration of federal criminal justice which should be settled by this Court. Moreover, the decision below conflicts with the doctrine enunciated in *Griffin* v. *Illinois,* 351 U. S. 12. It further conflicts, in part, with the principles stated in *Johnson* v. *Zerbst,* 304 U. S. 458.

1. The majority of the court below held that an application by an indigent petitioner for leave to appeal *in forma*

pauperis must be denied when the trial court certifies, under 28 U. S. C. 1915 (a), that the appeal is frivolous and when there is no showing that the trial judge acted without warrant or not in good faith. Accordingly, the Court of Appeals, without looking at the trial record and without reviewing the trial court's exercise of discretion, denied to petitioner a transcript of the trial proceedings or its equivalent and thus shut off his right to adequate appellate review.

The result reached by the court below enmeshes petitioner in a dilemma. As Judge Frank forcefully points out in his dissenting opinion, how can an indigent petitioner show the existence of a meritorious appeal or that the trial judge erroneously certified that the appeal was not taken in good faith unless a transcript of the trial proceedings or its equivalent is made available to him? The opinion of the majority fails to answer this critical question. By leaving it unanswered and by denying petitioner the means of establishing the meritorious character of his appeal, the result of the court below works an unconstitutional discrimination against petitioner; for if he were a person with means to purchase the transcript or its equivalent in the same situation, he would have the opportunity to demonstrate the trial judge's error.

Furthermore, denial to petitioner of the means of showing to the appellate court error in the trial judge's certification that the appeal is frivolous and not taken in good faith, in effect makes the trial court the court of last resort for an indigent defendant. To vest in the trial judge what amounts to unreviewable discretion to determine, in the case of an indigent defendant, whether errors have been committed by such trial judge in the conduct of the trial, appears somewhat less than realistic. Certainly it is incompatible with the high standards of federal criminal justice over the administration of which this Court has direct supervisory power. Cf. *McNabb* v. *United States*, 318 U. S. 332, 340-341.

2. The decision below, moreover, conflicts with the principles of equality of justice and due process stated in *Griffin* v. *Illinois,* 351 U. S. 12.

We understand the doctrine of the *Griffin* case to be that once a system for criminal appeals has been established, an indigent person cannot be denied adequate appellate review solely because of his poverty. As applied to this case, the *Griffin* doctrine would seem to compel that petitioner, who is undisputably poverty-stricken, be afforded the means to show, through a transcript of the trial proceedings or its equivalent, that the trial court may have been in error in certifying, pursuant to 28 U. S. C. 1915(a), that the appeal was frivolous, lacking in merit and not taken in good faith. By the failure of the court below to afford such a transcript or its equivalent to petitioner, he is, solely because of his poverty, effectively denied adequate appellate review; he cannot secure either a review of the trial court's exercise of discretion in withholding a certificate of good faith under 28 U. S. C. 1915(a), or a review of the trial proceedings in which he was convicted. Thus, petitioner has been denied rights guaranteed to him by the Fifth Amendment. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497.

The opinion of the majority of the court below distinguished the *Griffin* case on the ground that there the majority opinion of this Court "was not addressed to the problems involved in frivolous appeals" (R. 7). The majority below then stated that the trial court's determination that petitioner's appeal was frivolous was "final", absent a showing that he acted without warrant or not in good faith. Hence the majority implicitly concluded that the *Griffin* doctrine had no application here.

The basic fallacy in the majority's analysis, we submit, is that it fails to recognize that the only practical way in which an indigent petitioner can demonstrate to the appellate court that his appeal is *not* frivolous is by access to the transcript or its equivalent.

Further, the holding and reasoning of the majority below appears to be squarely in conflict with the views of this Court in the *Griffin* case, referring of course to the obligations of the States to provide transcripts to convicted defendants who are unable to pay for them (351 U. S. 12, 19):

> "Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

We submit that *a fortiori* in the federal courts "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts". Otherwise there will arise the anomalous situation in courthouse squares throughout the land where indigent defendants convicted in the county courthouse will be assured of adequate appellate review by virtue of this Court's decision in the *Griffin* case, but defendants convicted in the United States courthouse across the square will be shut off from effective appellate review because of inability to pay for the transcript.* Such a "misfit in a country dedicated to affording equal justice to all and special privileges to none in the

*The *Griffin* doctrine has been applied in two recent state court cases: *People* v. *Jackson*, 2 Misc. 2d 521, 152 N. Y. S. 2d 893 (New York); *Barber* v. *Gladden*, 298 P. 2d 986 (Oregon).

administration of its criminal law" would be unthinkable in the federal courts. And yet that is precisely what the court below has sanctioned.

3. The denial by the court below of petitioner's motion for assignment of counsel to aid him in prosecuting his motion for leave to appeal *in forma pauperis* conflicts both with the principles stated in *Johnson* v. *Zerbst*, 304 U. S. 458, and Rule 44 of the Federal Rules of Criminal Procedure. (See Appendix B, *infra*, p. 31). Moreover, as indicated by Judge Frank in his dissenting opinion in the court below, "* * * the *Griffin* doctrine requires that an indigent defendant have * * * legal assistance * * *" (R. 15).

It is noteworthy, too, that the majority of the court below offered no reason for refusing to appoint counsel for petitioner.

The denial of petitioner's request for assignment of counsel also conflicts with rulings made by other courts of appeals, including the Court of Appeals for the District of Columbia Circuit in which that court did assign counsel to aid an indigent petitioner in prosecuting a petition for leave to appeal *in forma pauperis*. Among instances in which that court has made such assignments are: *Gerringer* v. *United States*, 213 F. 2d 346, 348 (C. A. D. C.); *Kirksey* v. *United States*, 219 F. 2d 499, 500 (C. A. D. C.). See also *Hill* v. *United States*, No. 13,441 (C. A. D. C.) (unreported), in which the Court of Appeals on October 15, 1956, in response to a motion by an indigent defendant to have a transcript prepared at the expense of the United States and for appointment of counsel, appointed an *amicus curiae* to investigate and report with respect to the issues raised by the motion.

4. The importance of the questions herein presented in the administration of criminal justice in the federal courts

is self-evident. The Administrative Office of the United States Courts has advised us that, although statistics with respect to motions for leave to appeal *in forma pauperis* are not available from all of the courts of appeals, in the Court of Appeals for the District of Columbia Circuit "during the fiscal year 1956 there were 116 motions filed in the Court of Appeals for permission to appeal *in forma pauperis*", of which "about 100" were in criminal cases. The Clerk of this Court of Appeals has advised us that during the fiscal year 1956, of the 103 petitions for leave to appeal *in forma pauperis* filed in criminal cases, 16 were granted; counsel were appointed in 12 cases where the petition was granted, and in 5 cases where the petition was denied; transcripts were ordered at the expense of the United States in 8 cases where the petition was granted, and in one case where the petition was denied. See Appendix C, *infra*, p. 32.

Finally, the flat, unequivocal denial by the court of appeals below of this indigent petitioner's motion for leave to appeal *in forma pauperis*, for the assignment of counsel, and for a transcript without cost to him—a denial reached without looking at the record of proceedings in the trial court and coupled with the refusal to review the trial court's exercise of discretion in foreclosing petitioner's right to appellate review—raises the constitutional questions "with clarity, precision and certainty". *Rescue Army* v. *Municipal Court of the City of Los Angeles*, 331 U. S. 549, 576.

CONCLUSION

For the reasons stated above and particularly since this case presents important constitutional questions vital to the administration of federal criminal justice which have not been, but should be, settled by this Court, this writ of certiorari should be granted.

Dated: New York, N. Y.
January 7, 1957.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1956.

(Presented October 1, 1956 Decided November 9, 1956.)

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE JOHNSON,

Defendant-Appellant.

Before:

FRANK, MEDINA and HINCKS,

Circuit Judges.

Motion for Leave to Appeal in Forma Pauperis

The appellant GEORGE JOHNSON, *pro se.*

The appellee by CORNELIUS W. WICKERSHAM, Chief Assistant United States Attorney for the Eastern District of New York, in opposition.

HINCKS, *Circuit Judge:*

This is a motion addressed to this court for leave to appeal in *forma pauperis* and for assignment of counsel. The petition also, at least impliedly, seeks an order requir-

ing the United States "to prepay the cost of the minutes and records of all proceedings."

The movant after a five days' trial by jury in the District Court for the Eastern District of New York was convicted and on May 24, 1956 sentenced to a term of three years. On May 25, 1956 the movant filed a notice of appeal from said judgment. On May 25, 1956 he also addressed a petition to the trial court for leave to appeal in *forma pauperis* supported by a poverty affidavit the sufficiency of which is not disputed. In said petition he asserted, without further particularity, that "many prejudicial errors were committed against me and I therefore need the records and minutes to present them to the United States Circuit Court of Appeals for the Second Circuit."

In a written opinion dated June 1, 1956 Judge Rayfiel denied the petition saying: "The issues in the case were simple. The jury was adequately and properly instructed as to the law. The evidence amply supported its verdict. I am satisfied, and accordingly certify that the appeal is frivolous, lacking in merit, and not taken in good faith."

The petition addressed to this court, like that denied below, includes a poverty affidavit and a sworn statement that the petition is made in good faith, under belief that the movant is entitled to the relief sought. But there is nothing in the pending petition and nothing elsewhere in the record now presented to us, which shows that the certificate below was made without warrant and not in good faith.

Title 28 U. S. C. A. § 1915(a) provides: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." This statutory prohibition is applicable to the instant petition. *Wells* v. *United States*, 318 U. S. 257; *Dorsey* v. *Gill*, D. C. Cir., 148 F. 2d 857, 877 and 878, cert. den. 325 U. S. 890; *Bernstein* v. *United States*, 4 Cir., 195 F. 2d 517, cert. den. 343 U. S. 980; *Johnson* v. *Hunter*, 10 Cir., 144 F. 2d 565; *Par-*

sell v. *United States*, 5 Cir., 218 F. 2d 232. The books are replete with other federal decisions to the same effect.

In *Griffin* v. *Illinois*, 351 U. S. 12, the majority opinion proceeded on the assumption that in that case "errors were committed in the trial which would merit reversal": it was not addressed to the problems involved in frivolous appeals. In his concurring opinion, Justice Frankfurter said (page 24), "When a state not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." Such self-protection, we suggest, is also in the public interest for its impact on the prompt disposition of criminal administration: court dockets crowded with meritorious appeals should not be further burdened by frivolous appeals. In the federal system these considerations are dealt with in 28 U. S. C. A. § 1915. We see nothing in *Griffin* which suggests that the protection to the Government and the public afforded by that statute, as interpreted by the long line of federal cases referred to above, offends the Due Process or the Equal Protection Clauses.

We do not view the instant case as one of a person who is punished because he is guilty of the crime of being poor. He is punished because a jury in a court of unquestioned jurisdiction found him guilty of a serious crime beyond a reasonable doubt. And he is not entitled to the assistance which the law provides for a poor person in the prosecution of an appeal because Congress, by 28 U. S. C. A. § 1915(a), has directed that such assistance shall be withheld if the trial judge shall certify that the appeal is not taken in good faith. Certainly the deprivation of aid to prosecute a frivolous appeal is not "punishment." And it laid well within the Congressional power to designate the trial judge as the authority to determine whether a given appeal is frivolous. Such a determination is final, absent

a showing that the trial judge acted "without warrant or not in good faith." *Wells* v. *United States*, *supra*. As noted above, there is no such showing here.

The motion is wholly denied.

FRANK, *Circuit Judge* (dissenting):

1. Before 1956 when the Supreme Court decided *Griffin* v. *Illinois*, 351 U. S. 12, the courts, in cases cited by my colleagues, had held in effect that no constitutional question arose when there existed a discrimination against a man, solely because of his poverty, seeking to appeal from a judgment of conviction; the courts reasoned that no one had a right to appeal and therefore such a discrimination did not affect any constitutional right.[1] But in *Griffin* the Supreme Court declared that, once a state provides for appeals from convictions, such a discrimination against the poor violates the Fourteenth Amendment's guaranty of due process and equal protection of the laws. It would seem clear that the *Griffin* doctrine, via the due process provision of the Fifth Amendment, applies as well to a poor man's appeal from a federal conviction.[2]

The *Griffin* doctrine therefore brings sharply into focus the correct interpretation and effect of that part of 28 U. S. C. Section 1915(a) which reads, "An appeal may not be taken in forma pauperis if the trial court certifies that it is not taken in good faith." Were that language interpreted literally—so that the trial judge's certificate, his mere fiat, would not be reviewable—the statute, I think would fall foul of the *Griffin* doctrine, for it would mean this:

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[1]See, e.g., *Dorsey* v. *Gill*, 148 F. 2d 857, 877 (App. D. C.); *Higgins* v. *Steele*, 195 F. 2d 366, 368 (C. A. 8); cf. *U. S. ex rel. Kalan* v. *Martin*, 205 F. 2d 514 (C. A. 2); *U. S. ex rel. Rhein* v. *Foster*, 175 Fed. 772 (C. A. 2).

[2]*Bolling* v. *Sharpe*, 345 U. S. 972.

(1) If a convicted man has the money to pay the docket fee and for a transcript of the proceedings at his trial, the upper federal court, by at least reading the transcript, will ascertain whether or not there was reversible error at the trial, or whether or not there was such a lack of evidence, that the defendant is entitled to a new trial or a dismissal of the indictment.

(2) If, however, the defendant is so destitute that he cannot pay the docket fee, and if the trial judge has signed a certificate of "bad faith," then although a reading of the transcript shows clear reversible errors, the federal appellate court is powerless to hear the appeal and thus to rectify the errors; and even if the defendant has money enough to pay the docket fee but not enough for a transcript, the upper court usually has no way of determining whether there were such errors, must therefore assume there were none, and must accordingly refuse to consider his appeal. As a consequence, a poor man erroneously convicted—e.g., where there was insufficient proof of his guilt—must go to prison and stay there. In such a situation—i.e., where the upper court, if it had the transcript before it, would surely reverse for insufficiency of the evidence or on some other ground, but cannot do so solely because the defendant cannot pay for a transcript—the result is this: *He is punished because he is guilty of the crime of being poor* (more or less on the principle, openly avowed in Erewhon only, that one who suffers misfortunes deserves criminal punishment).[2a]

[2a] Butler reports that, in Erewhon, "Ill luck of any kind, or even *ill treatment at the hands of others, is considered an offense against society, inasmuch as it makes people uncomfortable to hear about it.* Loss of fortune, therefore * * * is punished hardly less than physical delinquency." He quotes a judge who told a defendant, "I should point out that even though the jury had acquitted you * * * I should have felt it my duty to inflict a sentence hardly less than that which I must

> This must be the consequence if the trial judge's certificate is not reviewable. It is no answer to say, as my colleagues do, that "the deprivation of aid to prosecute a frivolous appeal is 'not punishment.'" For such a literal interpretation of the statute will prevent the upper court from ascertaining whether or not the appeal is frivolous; if, in truth, it is not frivolous but the defendant, due to his poverty, is not permitted so to demonstrate, then, I think, he is punished for the crime of poverty.

Were the literal interpretation adopted, the statute would plainly discriminate against the poor. For then a trial judge who had committed grave errors, could usually, by a "bad faith" certificate, (a) block an appeal by an indigent defendant as (b) the judge could not do in the case of a well-to-do defendant. Doubtless, seldom would a trial judge seek thus to prevent an indigent's appeal when the judge had some doubt whether there were reversible errors. But a trial judge, in all honesty, may believe the trial free of error. In the instant case the trial judge stated, "The jury was adequately and properly instructed as to the law"; but experience teaches that not too infrequently a trial judge mistakenly entertains such a view of his instructions to the jury.

Fortunately, cases cited by my colleagues[8] go to show that, even before *Griffin*, the courts had rejected the harsh literal interpretation of the statute. Those cases hold that the trial judge's "bad faith" certificate is not final if the defendant shows the upper court that the trial judge, in

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pass at present; for the more you had been found guiltless of the crime imputed to you, the more you would have been guilty of one hardly less heinous—I mean that *crime of having been maligned unjustly*." Butler, Erewhon (Everyman's Library ed., 1917), 94, 116; cf. 80.

[8]See, e.g., *Wells* v. *U. S.*, 318 U. S. 257; *Higgins* v. *Steele*, 195 F. 2d 366, 368 (C. A. 8); *Parsell* v. *U. S.*, 218 F. 2d 232 (C. A. 5).

making his certificate, acted "without warrant or not in good faith." In other words, those cases hold, in effect, that the trial judge's certificate of "bad faith" enjoys no unqualified finality, that the execution of such a certificate is discretionary, and that it will be disregarded if it is made to appear to the appellate court that the trial judge "abused" his discretion. This I interpret to mean that if it is made to appear to the appeal court that there is merit in a poor man's claims of errors at the trial, an appeal in *forma pauperis* will be allowed, notwithstanding the trial judge's adverse certificate.[4]

But how can the existence of such a meritorious appeal be shown unless the defendant has access to a transcript of the events at the trial? My colleagues' opinion fails to answer that question. The pre-*Griffin* cases seem, at first glance, to have left this problem unsolved. They seem to say, what I think my colleagues say: "Yes, we will give you permission to appeal in forma pauperis—if you can prove what we will prevent you from proving."[4a] For sup-

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[4]In *Bernstein*, v. *U. S.*, 195 F. 2d 517 (C. A. 4), cited by my colleagues, the court of appeals denied a petition to appeal *in forma pauperis* because, without a transcript, it concluded that the record before it did not show that the trial judge's bad faith certificate had been made improvidently. Yet the court docketed the appeal and then dismissed it on the merits. I have difficulty in understanding that procedure: Unless the court granted leave to appeal *in forma pauperis*, I think it lacked power to excuse payment of the docket fee, and therefore lacked power to docket the appeal. That is, in order to docket the appeal, the court had to grant a *forma pauperis* appeal, regardless of the trial judge's bad faith certificate. If it did, then it should have ordered that the defendant be supplied with a transcript gratis.

Quite different is permission to file, followed by dismissal of the petition for leave to appeal *in forma pauperis*; cf. *Higgins* v. *Steele*, 195 F. 2d 366, 369 (C. A. 8).

[4a]Under such a ruling, the defendant's situation resembles that of a person who sought to sue *in forma pauperis* in England at a time when, to do so, he was obliged to obtain a lawyer's certificate that he had a good cause of action. This rule, says Maguire, is an illustration of a "vicious circle. An applicant comes to court for gratuitous legal services because he cannot beg or pay for a lawyer's services; he finds

pose that, in fact, a trial judge, in uttering a "bad faith" certificate, did "abuse" his discretion; nevertheless, absent a transcript (which the indigent defendant is unable to buy) it would seem that, usually[5] the defendant cannot show that there was such an "abuse," i.e., that the appeal has merit (in that, e.g., the evidence included a coerced confession or inadmissible and prejudicial testimony, or the prosecutor indulged in highly inflammatory and improper remarks to the jury).[5a]

Consider, for instance, *Provoo* v. *U. S.*, 215 F. 2d 531 (C. A. 2) where we reversed a conviction because the trial judge admitted irrelevant and most prejudicial evidence. Suppose that, in that case, the defendant, on account of poverty, had been unable to obtain a transcript and that the trial judge had issued a "bad faith" certificate. According to my colleagues, defendant's conviction would then have stood unreversed, since it would then have been impossible for defendant to reveal to our court the grave trial error or to show us that the trial judge, in issuing his certificate, acted "without warrant or not in good faith." I submit that such a result would be squarely in conflict with the *Griffin* doctrine: It would constitute a discrimination against a poor man, because a wealthy defendant in

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that he must beg or pay for a lawyer's services, before the court will hear him; and so his suit ends without ever beginning. * * * We find the needy suitor lifted from one horn of a delimma only to be more firmly impaled on the other." Maguire, Poverty and Civil Litigation, 36 Harv. L. Rev. (1923) 361, 377, 380.

[5]I say "usually" since there are some few cases where, absent a transcript, trial errors will be manifest—e.g., where an indictment on its face is wholly defective.

[5a]I assume that, in determining whether the trial judge's certificate should be disregarded, the appellate court is to determine merely whether the appeal is frivolous, and that, in so determining, it will apply the same test as under Criminal Rule 46 (a) (2) as recently amended.

the same situation would be able to prove the trial judge's error.[6]

But such a result is not necessary: In the federal courts, a destitute defendant, to whom a transcript is not available, can obtain the equivalent, in the manner described in *Miller* v. *U. S.*, 317 U. S. 492 and *U. S.* v. *Sevilla*, 174 F. 2d 879 (C. A. 2):[7]

> If competently advised by counsel, the defendant will present to the trial judge a statement of the proceedings at the trial, "made up from the best sources available." The judge then will have the duty to assist in amplifying, correcting and perfecting that statement from the best sources available to him. To that end, the judge may and should interrogate the witnesses, the counsel who represented the government and the defendant at the trial, and any other persons having reliable information. Outstanding among such other persons is the official reporter who took stenographic notes during the trial. The judge may require the reporter to read to the judge from those notes.[8]

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[6]My colleagues' opinion might conceivably be read to mean that, even in the absence of a transcript, the defendant may get around the trial judge's "bad faith" certificate by alleging in his *forma pauperis* petition to the appellate court serious trial errors, "with reasonable particularity." However, according to my colleagues' opinion in *U. S.* v. *Farley* (C. A. 2), also decided today, the defendant in such circumstances would be in this position: The appellate court would allow the defendant to renew his application to the trial judge; if the judge again certified no "good faith," the upper court would be obliged to deny leave to appeal *in forma pauperis*, unless defendant showed that the certificate itself was "without warrant and not in good faith"; but the appellate court and the district judge must deny defendant the sole means of so showing, i.e., a transcript or the equivalent.

[7]See also *U. S.* v. *Sheridan*, 329 U. S. 379, 393; *Helwig* v. *U. S.*, 327 U. S. 770 and 328 U. S. 820; cf. *Griffin* v. *Illinois*, 351 U. S. 12, 20 as to "bystanders' bills of exception."

[8]See *U. S.* v. *Sevilla*, 174 F. 2d 879, 880 and note 4 (C. A. 2).

The following alternative suggestion might perhaps be approved by the Supreme Court: (1) After *Wells* v. *U. S.*, 318 U. S. 257, the

> However, in order to avoid so laborious a task, the judge may avail himself of 28 U. S. C. Section 753(b) by directing the official reporter to transcribe the notes and, free of charge, deliver a transcript to the judge.[9]

With the statement (consisting of the transcript or otherwise prepared) approved by the trial judge, the upper court will be able to decide whether the judge's certificate of "bad faith" is justified. In that way the *Griffin* doctrine will be satisfied. In order, however, adequately to procure such a statement, and also adequately to point out in a petition to the upper court that (if it be a fact) the judge's certificate was mistaken, the ordinary indigent defendant will need the assistance of counsel. Without such lawyer-assistance, such a defendant will be at a marked disadvantage as compared with a non-indigent defendant. Accordingly, I think the *Griffin* doctrine requires that an indigent defendant have such legal assistance; I think the spirit of the Sixth Amendment, taken together with Criminal Rules 39(a) and 44, reinforces that requirement.[10]

Supreme Court, in *Roberts* v. *U. S.*, 339 U. S. 84 (citing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541), held that the denial by a district judge of a motion to appeal *in forma pauperis* is a final appealable order, under 28 U. S. C. Section 1291. See also *Adkins* v. *Dupont Co.*, 335 U. S. 33. (2) In *Wells*, the Supreme Court in effect held that the district Judge's certificate of bad faith is reviewable. Coupling *Wells* and *Roberts*, it may be that the judge's action in issuing such a certificate is an appealable order. (3) If so, the defendant may appeal from that order. On defendant's making a showing of poverty, the appellate court could perhaps allow him to prosecute that appeal *in forma pauperis* under 28 U. S. C. Section 1915 (a). (4) Should it do so, the appellate court could direct that the defendant receive a transcript gratis under 28 U. S. C. Section 753 (f).

[9]See *U. S.* v. *Sevilla*, 174 F. 2d 879, 880 (C. A. 2).

[10]The Supreme Court has said that the accused "requires the guiding hand of counsel in every step of the proceeding against him." See *Powell* v. *Alabama*, 287 U. S. 45, 69; *Johnson* v. *Zerbst*, 304 U. S. 458, 463. See also Donnelly, Book Review of Beaney, The Right to Counsel in American Courts, 64 Yale L. J. 1089 (1955).

Criminal Rule 39 (a) provides: "The supervision and control of the proceedings on appeal shall be in the appellate court from the time

In the instant case, defendant, who had had a court-appointed lawyer up to the time of his conviction, had none thereafter. His need for one is reflected in the crude character of his application in *forma pauperis*. In *U. S.* v. *Sevilla*, 174 F. 2d 879 (C. A. 2), we appointed a lawyer to aid the defendant in preparing a statement of the trial proceedings, although there the defendant, an alien, could not, under the statute, appeal in *forma pauperis*. *A fortiori*, here, where defendant is not an alien, we should appoint a lawyer to guide defendant (a) in procuring a statement of the trial proceedings and (b) in drafting and presenting to us a revised motion for relief in *forma pauperis*.[11]

I conclude then that, although we should now deny defendant's motion, we should do so with leave to file a revised motion after the defendant—with the aid of counsel designated by us to assist him—has obtained a statement of the proceedings at the trial; such counsel should also aid defendant in preparing and presenting the revised motion. We can then, on that basis, informedly consider whether to grant leave to appeal in *forma pauperis*.

2. Because of my colleagues' approach to the problem, I think it desirable to add the following:

(a) As my colleagues say, the courts should discourage frivolous appeals. However, judicial denials of *forma pauperis* appeals cannot discourage appeals by defendants

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the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion * * * for directions to the district court or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal * * *" Criminal Rule 19 provides: "If the defendant appears in court without counsel, the court shall * * * assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

[11] By appointing a lawyer for that limited purpose we would not, as yet, be deciding whether to grant defendant leave to appeal *in forma pauperis*.

who are financially well off; and the fact that a defendant —e.g., a wealthy professional criminal or a member of a wealthy criminal gang—can afford to pay for his appeal is no assurance that it is not frivolous. But let us arbitrarily assume, *arguendo*, that the appeals of poor men in prison are much more likely to be frivolous than those of the well-heeled.[12] Even so, the fact remains that usually, without a transcript or the equivalent, an appellate court cannot tell whether or not a particular poor man's appeal has substance. Here, then, is an apparent dilemma: In order to know whether to grant a *forma pauperis* appeal, which carries with it a right to a transcript supplied gratis, usually the upper court must have before it a transcript or its equivalent.

The way out of this apparent dilemma is to consult the interest of justice: Surely, even if but one out of a hundred attempted appeals by indigents has merit, justice compels the conclusion that that appeal shall be heard. It is no answer that so many appeals will result as to "crowd the docket." If so, more judges should be appointed. True, the cost of running the government will somewhat increase. But I, for one, cannot sleep well if I think that, due to any judicial decisions in which I join, innocent destitute men may be behind bars solely because it will cost the government something to have their appeals considered.

The American Bar Foundation noted in 1955: "Although the right of counsel may be clearly expressed in law, the exercise of the right to counsel may be impaired substantially by the imposition of costs and fees. In some jurisdictions a defendant, without resources to provide for his own defense, may have a completely adequate defense, from preliminary hearing to final appeal, entirely free of

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[12]It should be noted that an appellate court may summarily dispose of a frivolous appeal by one able to afford an appeal.

costs or fees. In others, court costs, the cost of transcripts, * * * and the like may operate to deprive him of the opportunity which the law purports to give him."[12a] In the light of *Griffin* v. *Illinois*, I think (contrary to my colleagues) that the federal courts are not in the second category.

(b) The *Griffin* doctrine represents an important step forward in the direction of democratic justice. My colleagues, regarding it as a bold step, shudder away from applying that doctrine to a case like that at bar (indeed are reluctant to apply pre-*Griffin* decisions like *U. S.* v. *Sevilla, supra*).

Yet *Griffin*, splendid though it is, is not exceptionally bold. We still have a long way to go to fulfill what Chief Justice Warren has called our "mission" to achieve "equal justice under the law,"[13] in respect of those afflicted with poverty. In our federal courts, and in most state courts, there is no provision by which a poor man can get funds to pay for a pre-trial search for evidence which may be vital to his defense and without which he may be deprived of a truly fair trial. Furnishing him with a lawyer is not enough: The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist.[14] It might, in-

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[12a] Am. Bar Foundation, The Administration of Criminal Justice in the United States (1955) 164.

See also Mayers, The American Legal System (1955) 144.

[13] Warren, Chief Justice John Marshall: A Heritage of Freedom and Stability, 41 Am. Bar Assn. (1955) 1008, 1110.

[14] The Am. Bar Assn. through its Special Committee on the Administration of Criminal Justice, proposed in 1953 to study the problem; see 39 Am. Bar Assn. J. 743 (1953).

See Bliss, Defense Detective, 47 J. of L., Criminal Law, Criminology and Police Science (1956) 264 to the effect that in three

deed, reasonably be argued that for the government to defray such expenses, which the indigent accused cannot meet, is essential to that assistance by counsel which the Sixth Amendment guarantees. Legal Aid has no money available for that purpose, nor, in most jurisdictions, does the Public Defender (if there is one). In such circumstances, if the government does not supply the funds, justice is denied the poor—and represents but an upper-bracket privilege.

Sixteen centuries ago, Lactantius wrote, "Nobody is poor unless he stands in need of justice." It should give us pause not only that Magna Carta forced the king to agree, "To no one will we sell, to no one will we refuse, * * * justice;" but also that, in ancient pre-democratic days, many a Bill in Eyre or Bill in Chancery successfully asked the aid of the court because the petitioner was poor and needed help against a wealthy and powerful opponent.[14a] Surely our democracy should follow and enlarge upon those examples. Most of our state constitutions, echoing Magna Carta, proclaim that "every person ought to obtain justice freely without being obliged to purchase it"; yet, as matters now stand, men are often "obliged to purchase justice" or go without it if they have not the wherewithal. Such are the coercions of poverty that a decent sensible lawyer may well advise an innocent man, too poor to obtain essential defense evidence, to bargain with the prosecutor

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California counties, and also in Chicago and in Memphis, Tennessee, the Public Defender employs investigators who, free of charge, assist indigent defendants charged with crime, to obtain evidence in preparing their defense; in some of those places, apparently such defendants are also supplied, gratis, with the services of expert witnesses.

[14a]Consider the plight today of a destitute man prosecuted by a wealthy government.

For a resume of the early history in England of procedural relief to the poor, and the early development of suits *in forma pauperis*, see, e.g., Maguire, Poverty and Civil Litigation, 36 Harv. L. Rev. (1923) 361, 363 ff.

to accept a plea of guilty to a lesser crime than that with which the defendant is charged.

For thirteen years, I have been calling attention to this problem and urging a solution.[14b] I was most agreeably surprised, therefore, to learn, just the other day, that in Scandinavia it has been the practice, for upwards of seventy years, not only to allow every accused a defense counsel of his choice at government expense, but to place the police department and the office of the prosecutor equally at the service of the defense and the prosecution; defense counsel may have these agencies, at government expense, make all necessary investigations, including searches for witnesses and documents and analysis by handwriting, medical or chemical experts; and the prosecution is responsible for producing at trial the witnesses called by the accused as well as all other evidence he wishes introduced—again at government expense.[14c]

[14b]Frank, White Collar Justice, Sat. Ev. Post, July 17, 1943. See also Frank, Courts on Trial (1949) 94-99; Frank, Administration of Criminal Justice, 15 F. R. D. (1953) 95, 100-101.

[14c]Norway: For general outline of procedure in this respect see Stang, Rettergangsmaaten i straffesaker, 186-196 (1951); see also Lov om rettergangsmaatan i straffesaker, 1 July 1887 Secs. 170, 292-305, particularly Sec. 294, for provisions in the Code of Criminal Procedure. Sweden: Sveriges Rikes Lag, R. 17, Rattergaangs Balk. Denmark: Lov om Rettens Pieie, 11 April 1916, Munch-Pettersen Ed. 1946, Chapter 75.

In my article, White Collar Justice, *supra*, and in Courts on Trial, I have pointed out that a similar problem exists in civil litigation. In Scandinavia, the cost of civil litigation—including the cost of necessary pre-trial investigation—may be at government expense if the party otherwise would be unable to bear the expense involved in trial of the case without depriving himself and/or his family of reasonable items necessary for daily living. For provisions in the codes of civil procedure in the respective countries, see Lov om rettergangsmaaten for tvistemaal, 13 August 1915 Nr. 6 Sections 169, 170 (Norway); Lov om rettens pleje, 11 April 1916, Sections 330-332 (Denmark); Sveriges Rickes Lag (1935 Ed.), R. 14:8, Lag om fri rattegaang, 19 June 1919 Sections 1-3 (Sweden).

The material in this footnote has been supplied by my law clerk, Walter Shuttleworth.

The federal government and all the states in this country, the richest on the globe, will, I hope, soon emulate the less opulent Scandinavian countries. Pending the time when they do so, considerations of expense should not stand in the way of the far more modest undertaking which I think necessary in the instant case, i.e., governmental assistance to a poor man necessary to enable him, as well as a rich defendant, to appeal his conviction if his appeal is meritorious.[15] If my colleagues' decision, which denies such assistance, were compelled by the statute and the precedents, I would concur,[16] contenting myself with urging reform by legislation. I think, however, the statute and the precedents have no such compulsion but, on the contrary, authorize us to do justice (as above described).

Although the courts can do and have done something to protect the poor (or relatively poor) from the consequences of gross inequalities in economic bargaining power,[17] of course the courts cannot and should not try to do away with the effects of all or most economic differences. But they can and should wipe out all the litigious disadvantages of poverty whenever a man is charged with, or convicted of, a crime.

My colleagues seem to have a fear—of a sort often voiced in the past by other judges when liberalization of

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[15]The expense to the federal government of supplying a transcript is by no means enormous; the official reporter receives a salary and adds to his income by selling transcripts to those who can pay for them. In return, he must supply, free, a transcript, if requested, to the judge and to the prosecutor, and also to a defendant who has leave to appeal *in forma pauperis*. It is perhaps arguable that, if the number of transcripts furnished such defendants increased substantially, the reporters would ask and receive increased salaries. The amount of such a possible increase is conjectural.

[16]If the only obstacle consisted of precedents, I would urge that *stare decisis* should receive scant respect with reference to former decisions in criminal cases adverse to the defendant. See concurring opinion in *U. S.* v. *Scully*, 225 F. 2d 113, 118-119 (C. A. 2).

[17]For instance, in cases involving seamens' releases, peonage, economic duress, and some kinds of 'contracts of adhesion."

doctrines has been urged—that dire consequences will follow.[17a] So, when in 1731 an English Act was enacted providing that all judicial proceedings should be in English, "some wise men predicted it would ruin England, some still wiser men seized on minor inconveniences that resulted from it as quite sufficient to damn it, and succeeding generations wondered why it had not passed a century earlier."[18]

We would do well to listen carefully to these recent remarks of Lord Justice Denning: "But * * * when I see how the lawyers (of England and America) have withstood desposition and tyranny from without, I sometimes think that within the law they have not been as vigilant as they should. Freedom has on occasions been abused even within the law itself. * * *"[19] The decision in this case should not be one of those occasions. For a man is free only if, among other things, "he is not liable to be * * * imprisoned without redress under an equal and impartial law * * * Freedom is not something which has to be safeguarded, but rather something to be extended."[20] Freedom confined to the status quo cannot grow; and freedom which does not grow tends to wither. Danger to democratic freedom lurks in the sentiment, "Come weal, come woe, my status is quo."[21]

[17a]See, for a criticism of this attitude, the dissenting opinion of Mr. Justice Brennan (then Judge of the Supreme Court of New Jersey) in *State* v. *Tune*, 13 N. J. 203 at 227ff. (1953).

[18]Winfield, The Chief Sources of English Legal History (1925) 13.

[19]Denning, The Price of Freedom: We Must Be Vigilant Within the Law, 41 Am. Bar Assn. J. (1955) 1011.

[20]Hampshire, 5 Encounter (1955) 36, 37, 39.

[21]In 1913, Elihu Root said: "No one * * * doubts that it is the proper function of government to secure justice. In a broad sense that is the chief thing for which government is organized. Nor can any one question that the highest obligation of government is to secure justice for those who, because they are poor and weak and friendless, find it hard to maintain their own rights." He added that "it is time to set our own house in order." Root, Foreword to Smith, Justice and The Poor (3d ed. 1924).

APPENDIX B

1. The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

3. Title 28, U.S.C., Section 1915 (Act of June 25, 1948, chapter 646, 62 Stat. 954, as amended):

> § 1915. *Proceedings in forma pauperis*
>
> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit

that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

Title 28, U.S.C., Sections 753(b) and 753(f) (Act of June 25, 1948, chapter 646, 62 Stat. 922):

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order

of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request. He shall also transcribe and certify all pleas and proceedings in connection with the imposition of sentence in criminal cases and such other parts of the record of proceedings as may be required by rule or order of court.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

* * *

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous but presents a substantial question. The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

5. Rule 44 of the Federal Rules of Criminal Procedure:

Assignment of Counsel

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

APPENDIX C

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Petitions filed during fiscal year 1956 to be allowed to appeal in forma pauperis from judgments of conviction in criminal cases or from orders denying applications collaterally attacking judgments of convictions, including (1) motions to vacate sentence filed pursuant to the provisions of Sec. 2255, Title 28, United States Code, and (2) petitions for habeas corpus.

PETITIONS FILED			TO REVIEW JUDGMENTS OF CONVICTION											
			Disposition[1]			Counsel[2]				Transcripts			
						Appeal Granted		Appeal Denied		Appeal Granted		Appeal Denied	
Total	Grant	Deny	Total	Grant	Deny	Appointed or Retained	Not Appointed or Retained	Appointed or Retained	Not Appointed or Retained	Ordered at U.S. Expense	Denied or Not Requested	Ordered at U.S. Expense	Denied or Not Requested
103	16	87	31	8	23	8	0	5	18	7	1	1	22
			TO REVIEW DENIAL OF MOTION TO VACATE SENTENCE										
			72	8	64	4	4[3]	0	64[4]	1	7[5]	0	64[4]

1/ This heading does not indicate ultimate disposition of the case, but merely disposition of the petition for leave to appeal in forma pauperis.

2/ It will be noted that the number of counsel appointed or retained is 17. Nine of these were appointed by this Court. The remaining eight were probably retained or appointed by the District Court.

3/ Five cases were remanded to the District Court on the moving papers for hearing. This Court took no action on appointment of counsel in four of these remanded cases. In one of the remanded cases this Court did appoint counsel.

4/ Of these sixty-four cases, two were dismissed as moot.

5/ As indicated in Note 2 supra, this Court appointed counsel in one of the remanded cases. In that case request for transcript was denied. In the other four remanded cases, this Court did not order a transcript.

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No. 531 Misc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

GEORGE JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Of Counsel

IN THE

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ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

A

OPINIONS BELOW

The opinions in the court of appeals below have been reported at 238 F. 2d 565. The opinion of the district court has not been reported.

B

GOVERNMENT'S CONCESSIONS

The Government with commendable candor concedes that petitioner should have been permitted with the assistance of counsel to present to the court of appeals a sufficient analysis of proceedings in the district court—possibly with

the aid of the transcript of such proceedings—to enable the court of appeals to determine whether the trial judge erred in withholding his certificate of good faith under 28 U. S. C. 1915(a) (Gov. Br. 7, 9). The Government thus in effect admits error in the proceedings below in that petitioner (a) was not represented by counsel in the district court or in the court of appeals at any stage of the proceedings in which he sought to establish his right to appeal *in forma pauperis,* and (b) was precluded from obtaining a copy of the transcript or its equivalent by which he would be able to show to the court of appeals that the trial judge erroneously issued a certificate of bad faith. With this we agree.

C

GOVERNMENT'S PROPOSED REMEDY

We respectfully disagree, however, with the Government's proposed method of correcting the errors below by requesting this Court to deny the petition for certiorari "at this time" (Gov. Br. 9). We submit that the Government's suggested corn-plaster remedy for patching up this cancerous condition in the administration of federal criminal justice should be rejected and that this Court should review this case *at this time* for these reasons:

(1) The record in the instant case is fully adequate, clear and precise to enable this Court to decide *now* the fundamental questions presented by the petition. These questions involve essentially whether the doctrine of *Griffin* v. *Illinois,* 351 U. S. 12, is to be applied to appeals by indigent defendants in the federal courts.

(2) The Government's contention that the record does not disclose any meritorious grounds upon which petitioner should be allowed to appeal *in forma pauperis,* begs the

very questions presented for determination. Denied the assistance of counsel and access to the transcript or its equivalent, petitioner of course cannot show to the appellate court errors which would merit reversal. If petitioner had been accorded these rights, the questions presented by the petition would not have arisen.

(3) The Government's suggestion that "the Court deny the petition as of this time without prejudice to its renewal after counsel shall have aided petitioner in determining whether he has a basis for appeal and, if he deems it appropriate, has resubmitted the motion to the court below" (Gov. Br. 9), will settle nothing. On the contrary, it will result in an unnecessary, protracted and wholly abortive proceeding. The way out suggested by the Government should be rejected for these reasons:

(a) As much as petitioner's assigned counsel appreciates the Government's generous suggestion that the scope of his assignment be expanded to embrace representing petitioner in the lower courts, counsel believes that the Court of Appeals for the Second Circuit, in limiting his assignment to "prosecute an application for a writ of certiorari" (R. 25), did so advisedly. After all, the court of appeals had squarely before it the question of whether to assign counsel to represent petitioner in connection with matters in the lower courts relating to his appeal. Over the protest of Judge Frank's dissenting opinion, it declined to do so. In assigning counsel to represent petitioner in seeking a writ of certiorari, however, the court of appeals obviously recognized the importance of the questions presented by its decision—questions that only this Court can settle.

(b) The Government's proposal that petitioner's assigned counsel, with the decision of the court of

appeals below standing as the law, assist petitioner in resubmitting his motion to the court below, clearly would be doomed to failure before the effort were begun. In the first place, the assigned counsel who represented petitioner during his trial is not available.* Secondly, in view of the trial judge's position (Gov. Br. App. 11) that he "adequately and properly instructed [the jury] as to the law" and that "the appeal is frivolous, lacking in merit, and not taken in good faith" it would hardly be realistic to suppose that petitioner's assigned counsel could expect much help from the trial judge in obtaining an equivalent of the transcript with which to attack his finding. Thirdly, in view of the Government's position in the form of an affidavit by the Chief Assistant United States Attorney (R. 3, 4) opposing petitioner's application in the court of appeals for leave to appeal *in forma pauperis*, aid from Government counsel in pre-

*The Government places much emphasis upon the possibility that the court-appointed lawyer who represented petitioner in the trial court up to the time he was sentenced (petitioner was not represented by counsel at any time thereafter, i. e. at no time in connection with his applications to the district court and to the court of appeals for leave to proceed *in forma pauperis* [R. Group 11; R. 1, 2; Gov. Br. App. 11; Pet. App. 21]) should aid petitioner in making a specific attack upon the trial judge's certificate of bad faith (Gov. Br. 7-9). The fact is that petitioner's court-appointed trial counsel, for reasons of his own and which we are not in a position to question, has declined further to participate in the case. Diligent efforts on our part to communicate with him have been in vain. This is an illustration of one of the difficulties inherent in the present system of assigning defense counsel to indigent persons in criminal cases in the federal courts—a system characterized by Attorney General Brownell as operating on a "catch-as-catch-can basis" in his recent communication to Congress proposing a bill to provide for public defenders in the federal courts to "give real meaning to the Sixth Amendment". N. Y. Times, February 12, 1957, p. 18. The operation, or, as in the instant case, the breakdown in the operation, of the "catch-as-catch-can" system of assigning counsel to indigent defendants in criminal cases in the federal courts, certainly should not deter this Court from issuing a writ of certiorari to review such fundamental questions in the administration of federal criminal justice as are presented by the petition in the instant case.

paring an attack upon the trial judge's certificate of bad faith would be most unlikely. Fourthly, the Government even now (Gov. Br. 7) questions the necessity or propriety of granting petitioner or the court of appeals access to the trial transcript—which under all the circumstances here disclosed is the only adequate means of enabling petitioner to establish his right to appellate review. Finally, with the decision of the court of appeals below as the law of this circuit, any attempted preparation of a revised motion by petitioner based upon some sort of an equivalent of the transcript as suggested by Judge Frank (which the Government suggests but the court of appeals has not sanctioned) would, aside from the practical difficulties noted above, be a completely wasted effort; without the transcript, the court of appeals would be in no better position to rule on the same question it has now squarely decided. Necessarily it would consider itself bound by its earlier decision.* We would then be back to this Court after much needlessly wasted time and effort.

(c) As reflected by the action of the court of appeals below in assigning counsel to file this petition for certiorari, we submit that these questions are of sufficient importance in the administration of criminal justice throughout the federal courts to warrant the granting of this petition at this time. The dilemma confronting all federal courts by precisely the situation with respect to appeals by indigent defendants as is presented by this petition, cries out for prompt solution. Avoidance of the problem by the patchwork type of remedy suggested by the Government will serve only to postpone the deci-

*The Court of Appeals for the Second Circuit, on November 9, 1956, the day upon which it decided the instant case, applied similar principles in deciding *United States* v. *Farley*, 238 F. 2d 575, and *United States* v. *Branch*, 238 F. 2d 577.

sion which inevitably this Court must render. Delay will result in continued deprivation of vital constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted *at this time.*

Dated: New York, N. Y.
February 14, 1957

Respectfully submitted,
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BARRY H. GARFINKEL
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 531 Misc.

GEORGE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. App. 11-27) have not yet been reported. The opinion of the District Court denying leave to proceed *in forma pauperis* is printed as an Appendix to this brief, *infra*, pp. 10-11.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1956. The time for filing a petition for

a writ of certiorari was, on December 8, 1956, extended by order of Mr. Justice Harlan, to and including January 9, 1957. The petition was filed on January 8, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case in which a district court on application to it for permission to appeal *in forma pauperis* had certified that the appeal was frivolous, lacking in merit, and not taken in good faith, the Court of Appeals properly denied motions to it for leave to appeal *in forma pauperis*, for the furnishing of a transcript, and for appointment of counsel.

STATUTE INVOLVED

28 U.S.C. 1915 provides in pertinent part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> (b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid

when authorized by the Director of the Administrative Office of the United States Courts.

* * * * *

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT

Petitioner and four other persons were indicted in the United States District Court for the Eastern District of New York on a seven count indictment charging them with stealing, forging, and uttering government checks. Petitioner alone stood trial. His four co-defendants, each of whom had pleaded guilty to two counts, testified for the government. Petitioner was represented by court-appointed counsel, described by the trial judge as "a capable lawyer of considerable experience." (Appendix, *infra*, p. 10).

Petitioner was convicted on all seven counts. Before imposition of sentence, but more than five days after conviction, petitioner sent to the trial judge a notice of motion for a new trial not prepared by his counsel. The court informed counsel of the motion and set the matter for hearing. Counsel made a formal motion for a new trial, not urging the grounds stated by petitioner in his notice. That motion was denied and petitioner was sentenced to three years' imprisonment on each count, the sentences to run concurrently.

The day after sentence, on May 26, 1956, petitioner *pro se* filed a notice of appeal to the Court of Appeals

and made application for leave to appeal *in forma pauperis*. In his affidavit he stated:

> Many prejudicial errors were committed against me, and I therefore need the records and minutes to present them to the United States Circuit Court of Appeals for the Second Circuit.

The District Court denied the application on June 1, 1956, setting forth the facts noted above and stating (Appendix, *infra*, p. 11):

> The issues in the case were simple. The jury was adequately and properly instructed as to the law. The evidence amply supported its verdict.
>
> I am satisfied, and accordingly certify that the appeal is frivolous, lacking in merit, and not taken in good faith.

On September 20, 1956, petitioner addressed to the Court of Appeals motions for leave to appeal *in forma pauperis*, for the furnishing to him of a transcript of the testimony, and for assignment of counsel. The Court of Appeals denied the motion. All three judges in the Court of Appeals agreed that, on the basis of the record before them, there were no facts which would justify failure to give effect to the trial judge's certificate of bad faith (Pet. App. at pp. 12-14, dissent on p. 21). Judge Frank, dissenting, expressed the view that counsel should be assigned to petitioner and that petitioner should be given leave to file a revised motion for leave to appeal *in forma pauperis* with the aid of counsel, utilizing appropriate methods for obtaining the equivalent of the transcript of testimony (see Pet. App. 17-21).

ARGUMENT

1. It is not clear from the petition whether petitioner is attacking the ruling of the court below denying leave to appeal *in forma pauperis*, a ruling in which all three judges concurred, or whether he is supporting only the position taken by the dissenting judge that counsel be appointed for petitioner to prepare a statement of the trial proceedings and present a revised motion for leave to appeal *in forma pauperis*. In so far as the first question may be pressed, we submit there is no reason for review by this Court. Whatever might be disclosed by further examination of the record, there is no present basis for disregarding the certificate of the trial judge that the appeal is in bad faith. Unless 28 U.S.C. 1915 is unconstitutional because it denies to defendants without financial means the right to prosecute frivolous appeals, no basis has been advanced for reversing that part of the order. However, it appears that even defendants with sufficient funds to pay court fees and employ counsel have no right to prosecute frivolous appeals. *United States* v. *Johnson*, 327 U.S. 106; *Sykes* v. *United States*, 224 F. 2d 313 (C.A. 4). There thus appears to be no reason why so reasonable a protection against the prosecution *in forma pauperis* of appeals which have no merit should be unconstitutional. Certainly some such protection is necessary since needy defendants, having not even the expense of appealing to lose, would otherwise press appeals in every case.

This Court held in *Wells* v. *United States*, 318 U.S. 257, that, in view of the statutory provision that an "appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good

faith" (*supra*, p. 2), the certification by the trial judge should be controlling "in the absence of some showing that the certificate is made without warrant or not in good faith." Otherwise the unsupported allegation of a defendant would be given more weight than the formal, deliberate, opinion of a district judge.

Nothing in the decision of this Court in *Griffin* v. *Illinois*, 351 U.S. 12, weakens the effect of *Wells*. In the *Griffin* case, the opinion of Justice Black, for four judges, noted that on the record the Court was bound to assume that "errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript." 351 U.S. at p. 16. The concurring opinion of Justice Frankfurter noted that when "a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent," 351 U.S. at p. 24.

Here, the Court of Appeals was faced with what is manifestly a reasoned judgment of the trial judge that the appeal was frivolous and that to furnish a transcript of the record would be a waste of government money. Petitioner simply denied that this was so, without more. All the judges in the Court of Appeals recognized that this finding could not be disregarded without more of a showing than petitioner made in the Court of Appeals.

2. Judge Frank's dissenting opinion goes only to the question of whether petitioner should be assigned counsel to aid him in making a showing that the cer-

tificate of the trial judge was not issued in good faith, either by preparing a summary of the evidence as suggested by *Miller* v. *United States,* 317 U.S. 192, or by having the trial judge direct the official reporter to transcribe the notes free of charge for the judge, as suggested by *United States* v. *Sevilla,* 174 F. 2d 879 (C.A. 2) (Pet. App. 19-21). In effect, the dissent would make the transcript available to this defendant, despite the certificate of the trial judge and regardless of the merits of the case.

We think that the fallacy of the dissenting opinion lies in its failure to recognize that normally a defendant, who has been represented by counsel at the trial, has available to him a much less cumbersome means of showing that there is possible merit in the appeal. Trial counsel is in a position to indicate, without necessary reference to the transcript, possible bases for claims of error by the trial judge. We think that, before a district court is required to go through the elaborate proceedings suggested by the dissent, there ought, at the very least, to be some indication why trial counsel cannot assist a defendant in making out a case for attacking the certificate of the trial judge. If a showing is made that trial counsel is unable or unwilling to act, it may be necessary to assign new counsel to a defendant. But even if that becomes necessary we do not think that the transcript should be required until new counsel can assure the court that, after consultation with trial counsel and the government attorneys, he feels that the transcript is necessary for proper representation of the defendant. Otherwise, the protection against frivolous appeals and unnecessary costs, which the statute was designed to afford, would be for the most part meaningless.

Since no showing whatever was made as to why trial counsel could not assist petitioner in making a specific attack on the certificate of bad faith, we think the Court of Appeals was justified on the record before it in denying the request for assignment of new counsel. Not even in the petition for certiorari does petitioner attempt any explanation why trial counsel cannot be of help.

For this reason, the question presented by this case has none of the general importance which the petition for certiorari attaches to it. The Court of Appeals has not held that the certificate of the trial judge cannot be attacked. It has not held that counsel will never be assigned to a defendant to enable him to attack a certificate of bad faith. The case must be viewed on the basis of its particular record—the careful certificate of the trial judge, the fact that petitioner had counsel at his trial and does not explain such counsel's present unavailability, and the fact that petitioner's allegations reveal no substantial issue—on the basis of which there was no occasion to assign counsel for the purpose of attacking the certificate.[1]

---

[1] The statistics offered by petitioner do not establish any general importance of the problem presented by the particular facts of this case. They show that in the District of Columbia Circuit, which has wider criminal jurisdiction than the other courts of appeals, leave to appeal was sought from the Court of Appeals in cases involving direct review (as distinguished from collateral attack) in only thirty-one cases. In twenty-three of those cases, the Court of Appeals apparently agreed with the District Court that the appeal was without merit; in eight, it did not. Whether or not a certificate of bad faith was filed in such cases does not appear. The figures do indicate, however, that the indigent defendants have found it possible to make a proper showing to a court of appeals when there is merit in an appeal.

Moreover, there is no occasion to review that issue at this time. Petitioner now has counsel appointed by the court below for the purpose of petitioning this Court for certiorari. If the Court should grant the petition and, on review of the matter, determine that petitioner was entitled to counsel, that would not result automatically in the grant of permission to appeal *in forma pauperis* but only in an effort, then to be commenced by counsel, to ascertain whether there was a bona fide basis for appeal. The rights of the petitioner will be equally well protected and the time of both the Court and counsel will be conserved if that task is commenced immediately.

We therefore respectfully suggest that the Court deny the petition as of this time without prejudice to its renewal after counsel shall have aided petitioner in determining whether he has a basis for appeal and, if he deems it appropriate, has resubmitted the motion to the court below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied at this time.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

FEBRUARY, 1957.

APPENDIX

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Cr. 44387

IN THE MATTER OF THE APPLICATION OF GEORGE JOHNSON FOR LEAVE TO APPEAL IN FORMA PAUPERIS FROM A JUDGMENT OF CONVICTION

RAYFIEL, J.

An indictment was filed against the above-named applicant and four other persons, charging them, inter alia, with conspiracy, and with stealing, forging and uttering Government checks.

The applicant pleaded "not guilty". The case proceeded to trial on the 3rd day of May, 1956, and continued until the 7th day of May, 1956, when the jury returned its verdict of "guilty" on all seven counts of the indictment. The applicant's four co-defendants, each of whom had pleaded guilty to two counts of the indictment, testified in behalf of the Government. During the trial the defendant was represented by Norman Johnson, Esq., a capable lawyer of considerable experience.

May 24, 1956 was set for the imposition of sentence. On May 15, 1956, after the expiration of the five day period provided therefor by Rule 33 of the Federal Rules of Criminal Procedure, I received from the defendant a notice of motion for a new trial, apparently prepared by someone other than his counsel. Accordingly the latter was informed of the receipt of the notice, and of the fact that I would hear argument

thereon on the date fixed for the imposition of sentence. On that date a copy of the notice of motion was exhibited to applicant's counsel, and he was asked if he wished to argue the motion. He made a formal motion for a new trial, not urging the grounds stated by the defendant in the notice. The applicant was then permitted to argue in his own behalf. I denied the motion for a new trial.

The defendant was then sentenced to serve a term of three years on each of the seven counts of which he had been convicted, the sentences to run concurrently.

He then made the instant application to appeal in forma pauperis from the judgment of conviction.

The issues in the case were simple. The jury was adequately and properly instructed as to the law. The evidence amply supported its verdict.

I am satisfied, and accordingly certify that the appeal is frivolous, lacking in merit, and not taken in good faith. Therefore the application is denied.

Dated: June 1, 1956.

(Signed) LEO F. RAYFIEL,
United States District Judge.